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No. 96-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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26 pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. Any Circuit Conflict on the Issue in this Case Does Not Warrant Review; Prison Work Details, Prison Industries, Recreation and Religious Programs are Not Within the Scope of Title IX of the Education Amendments of 1972, because they are Not Education Programs or Activities. 11

II. Petitioners' Equal Protection Analysis is Based on the False Premise that Treating Lawfully Segregated Groups Differently for Neutral Reasons Constitutes Sex Discrimination. . . 16

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 7

Bell v. Wolfish, 441 U.S. 520 (1979) 21

Citibank, N. A. v. Wells Fargo Asia Ltd., 495 U.S. 660 (1990) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 13

Dothard v. Rawlinson, 433 U.S. 321 (1977) 16

Hernandez v. New York, 500 U.S. 352 (1991) 10

Jackson v. Thornburgh, 285 U.S. App. D.C. 124, 907 F.2d 194 (1990) 17

Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) 11, 16

Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996) . . 11, 16

Klinger v. Department of Corrections , __ F.3d __, 1997 U.S. App. LEXIS 3296, *11-*13 & N. 6 (8th Cir. Feb. 27, 1997) 12

Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1994) 6, 11

Pargo v. Elliott, 894 F.Supp. 1243 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 98 (1996) 6, 11

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 7, 10, 17

Pitts v. Thornburgh, 275 U.S. App. D.C. 866 F.2d 1450 (1989) 16

Procunier v. Martinez, 416 U.S. 396 (1974) 14, 21

Rhodes v. Chapman, 452 U.S. 337 (1981) 21

Shaw v. Reno, 509 U.S. 630 (1993) 10

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 10

United States v. Virginia, 116 S.Ct. 2264 (1996) 16

Washington v. Davis, 426 U.S. 229 (1976) 7, 16

Wisconsin v. City of New York,
116 S.Ct. 1091 (1996) 10

STATUTES

D.C. Code § 24-403 (1989 repl.) 14

D.C. Code § 24-412 14

D.C. Code § 24-418 14

Fifth and Fourteenth Amendments 16

Title IX of the Education Amendments of
1972, Pub. Law 92-318, 86 Stat. 373,
as amended, 20 U.S.C. § 1681(a) 6, 11

OTHER AUTHORITIES

34 C.F.R. § 106.31(a) 15

34 C.F.R. § 106.34 15

Random House College Dictionary (1967) 15

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

For decades, the District has had large facilities for housing male prisoners on the roughly 3,000-acre reservation (including a 460 acre farm worked by inmates) it has for corrections purposes in Lorton, Virginia. In 1994, it had three medium security facilities at Lorton, each housing more than one-thousand male inmates; Occoquan (1,767 inmates), Central (1,373), and Medium (1,067). (76a) It also had a Minimum Security Facility with 963 male inmates. (118a) Most of

these facilities are old, and have dormitory-type housing, which has contributed to a history of inmate-on-inmate violence. Due to their rural setting, however they have a number of advantageous features: playing fields and athletic facilities are easy to provide. Over the years, to serve their large populations, prison training facilities have been constructed.

For more than twenty-five years, from 1966 to 1992, most women prisoners convicted of violations of District laws served their sentences in federal prisons. In 1992, when the District decided that it was too expensive to continue to maintain its women prisoners in the federal system, the District had space available for 271 inmates in a new high-rise facility it had constructed near the Robert F. Kennedy Memorial Stadium, the Correctional Treatment Facility (CTF), which it had built to treat prisoners with substance abuse histories. This 800-bed facility was readily adaptable for medium security prisoners. The District put 271 of its medium security female prisoners there. (31a) Women are housed in large units at CTF, consisting of 32 single occupancy rooms per unit. Women prisoners have free movement on their units during most of the day. They are required to be in their rooms only during count times and from 11:00 p.m. to 5:00 a.m. Each unit also has a large central gathering area and two recreation rooms that have television sets. The District converted other army barracks-type dormitory buildings at Lorton to a minimum security facility for 174 minimum security female prisoners. (76a)

When the women prisoners returned from the federal prison system, "not all programs were in place;" an internal Departmental report attributed this failure to "the Department's sudden housing of 99.5 percent of all female D.C. Code offenders without having planned, developed and implemented either programs or resources to meet the long-term treatment

needs of this unique population." (117a) Planning documents of the Department of Corrections, specifically its Work Plan Objectives for successive 1992 to 1994 fiscal years, established dual goals of the Department with regard to women inmates' programs: "to provide a level of programs and services to female inmates that is comparable to that for male inmates," and "to develop comprehensive equitable and gender specific health, mental health, education, housing and community based rehabilitation programs for females housed * * *." (Tr. IX at 99-100) The more specific goals of the programs are to "look at the educational level and try to get them to the point of high school, * * * while at the same time learning a viable, easily marketable competitive skill and addressing their substance abuse issues as well as any health issues." (*Id.* at 16) By the time of trial, in June 1994, the Department had a substantial number of programs in place to meet these goals.

At that time, the Department had education programs on three levels at CTF: an ABE program, which is adult basic education at the elementary school level; a GED program, which is high school equivalency; college, offering an A.A. degree program, from Atlantic Union College. (124a-25a; Tr. IX at 19) Women may participate in education programs either three hours or one and a half hours a day, five days a week, depending on whether they were also in a vocational program. (*Id.*) If they are in a vocational program, it is one and one half hours, with an equal period in vocational training. (*Id.*) At the Annex, women were offered ABE and GED programs up to three hours a day, five days a week. (118a; Tr. IX at 10-20) Two elective college courses and two pre-college courses were offered each semester. (119a)

CTF has several vocational education programs, which are short-term because the majority of women prisoners serve short sentences (61% serve 2 years or less; only 13% more

than 4 years). (Tr. IV at 12, 15) The vocational programs offered are computer literacy, typing, and sewing; there is also a Graphic Arts program in which 13 minimum custody female inmates participate. (127a; Tr. IX at 12-13) Women prisoners at the Annex may participate in a 15-week Graphic Arts vocational education program. (119a)

There are six apprenticeship programs at Central. (128a; Tr. IX at 31) No other facility in the Department (including CTF and the Annex) has apprenticeship programs. (*Id.* at 30, 31)

Each of the District's facilities has basic work details or programs that are necessary to maintain the facility and pay inmates between $6 and $21 a month depending on the job. (119a; 128a-29a) Women at CTF work two shifts in the culinary unit and in janitorial type cleaning jobs. (Tr. IX at 36) Women at CTF also have work details involving "clerical assignments, education aides, environmental, intake, landscape, offices, quick copy, rec clerk, religious, supply management." (128a) Women at the Annex work in culinary, sanitation, environmental, and the law library. (119a-20a; Tr.IX at 38) They also work in the "reservation squad" which does clerical work and cleaning of the Department offices at Lorton and on squads that do landscaping and cleaning of parks and other public space. (Tr.IX at 38)

Industries are businesses for profit that use prison labor and sell the output to government agencies. (120a) Industries are self-supporting and pay inmates between $80 and $300 per month. (120a) Only 604 inmates in the District's prisons work in prison industries. (120a) There are no industry programs available to men or women at CTF. (Tr.IX at 28) Sixty-five women inmates at the Annex participate in industries at the Central Facility. (120a)

At CTF, the physical plant and the fact that facilities must be shared by four groups of inmates that cannot be mixed, limit the recreational opportunities for women prisoners as well as the other groups.[1] There is an outside yard that has basketball and volleyball courts, an indoor gymnasium, and a weight room. (130a) Women have outside recreation in the yard one hour a day, five days a week; access to the gymnasium for two hours, three times a week; and low-impact aerobics two days a week for an hour each day. (*Id.*) A recreation trailer has been provided to women at the Annex, which has a ping pong table, a pool table, exercise bikes and a weight machine. Women can walk the grounds when they wish; however, the Annex has no recreational equipment other than the equipment in the trailer. Women use the recreation areas (volleyball, handball, and basketball) twice a week for three hours. Both the units at CTF and the dormitories at the Annex have rooms for television and card or board games.

The district court held that female inmates at CTF and the Annex did not receive the same access to academic, vocational, work, recreational, and religious programs as similarly situated male prisoners in other prisons in violation of the equal protection guarantee of the Fifth Amendment and of Title IX of the Education Amendments of 1972, 20 U.S.C. §

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[1] CTF houses 800, composed of: (1) the Reception and Diagnostic male inmates who cannot mingle with other inmates because they have higher security levels; (2) female offenders who must be segregated from the male population; (3) inmates in the Intensive Substance Abuse Program who are segregated from the general population for therapeutic reasons; and (4) physically impaired inmates who are vulnerable to assaults from other inmates and have specialized recreation programs to meet their needs.

1681(a). It entered broad relief requiring the District to upgrade all programs.

On appeal, the District did not challenge the provisions of the decree that related to academic and vocational education. It challenged only those portions of the decree that related to work, recreational, and religious programs. (28a) The Court of Appeals reversed with respect to them, holding that for purposes of the work, recreational, and religious programs women prisoners were not similarly situated with the comparison male prisoners. (29a-36a) The Court of Appeals followed the decisions in *Klinger v. Department of Corrections*, 31 F.3d 727, 732 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1994), and *Pargo v. Elliott*, 894 F.Supp. 1243, 1254-62, 1290-91 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 98 (1996), which dealt with allegations and legal theories nearly identical to those of the inmates in this case.

REASONS FOR DENYING THE WRIT

In our view, this is solely a constitutional case. Our principal argument on the issue under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), is, as it was below, that Title IX does not reach the provision of religious programs for prisoners, or the provision of prison work details, prison industries, or recreation, because such programs are not "education programs" within the meaning of Title IX. That leaves only the Equal Protection Question in this case.

The precise constitutional question is a narrow one. It is whether, where it is perfectly lawful to segregate groups on the basis of sex, it constitutes discrimination on the basis of sex to treat the resulting groups differently for neutral (*i.e.*, non-sex-based) reasons, simply because any difference in treatment will have the effect of treating men and women

differently. We submit that under *Washington v. Davis*, 426 U.S. 229, 246-248 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979), it is not. Those decisions make clear that the equal protection guarantee of the Fifth Amendment prohibits only purposeful or intentional discrimination; it does not prohibit official action that, although facially gender neutral, results in a disproportionate impact on one sex, unless the action has a discriminatory purpose. *Feeney*, *supra*, 442 U.S. at 279-80.

In this case, it is clear that the women classified as medium security were placed in the CTF facility because that is where the District had a block of medium security spaces. There was no evidence that they were placed there *because* they were women. In accordance with its stated policy and goal, the District attempted to provide these women with access to the same sort of programs that were available to men. It had made very substantial progress toward that goal by mid-1994, when this case was tried, despite very serious fiscal problems that had required substantial reductions in city services. Women prisoners were not provided with access to as many athletic facilities because it was a good deal more difficult to provide athletic facilities in the high-rise environment to the CTF than in the extensive fields available at the 3,000 acre Lorton reservation. They were not afforded access to as many training programs for a similar reason: it was much more difficult to provide training facilities at the CTF and more expensive by far per prisoner. Indeed, as the Circuit noted, there is no claim that less money was spent affording programs to women than to men. (33a) And there is no evidence whatsoever that any training was denied to women prisoners *because* they are women.

Some different programs were provided, however, because of different characteristics of the population of women prisoners from those of the male population. In this regard it should be noted that petitioners were the first to point out these differences in the two populations. Thus their chief counsel emphasized in his opening statement that women prisoners had characteristics that differentiated them from male prisoners:

> Plaintiffs contend, and defendants do not dispute, that female inmates are more likely to be first offenders. Female inmates are more likely to have been the victims of physical and/or sexual abuse before incarceration. Female inmates suffer from lower self-esteem resulting in more dependent addictive personalities. Female inmates tend to have earned a lower rate of pay, been unemployed or on welfare prior to incarceration. Female inmates are generally less employable. Female offenders are more likely to be single parents with primary responsibilities in child rearing. Female inmates are more likely to be abandoned by their spouses, families and significant others in their lives upon incarceration, and female inmates tend to be less violent, assaultive and predatory than male inmates. (Tr. I, 4-5)

The plaintiffs' experts also noted such special characteristics. (Testimony of J. Lancaster, Tr.V at 5, 9, 10; Testimony of Dr. B. Major, Tr.IV at 43, 52-53; Testimony of Dr. S. Fiester, Tr.II at 8)

Some of the differences in the training were directly related to these differences. For example, as also emphasized in the opening statement, 82% of the women prisoners are single parents and the primary caretakers of their children. (Tr.I at 5; Tr.V at 9) A significant number are pregnant when they enter the system. The Department offers prenatal and parent-

ing classes to the women prisoners and employs a psychiatrist, a psychologist and two social workers to assist them in dealing with the many problems that arise from the separation from their children. (Tr.IX at 6-8, 10-11) Women prisoners also serve, on average, much shorter sentences than men and programs must be geared to the shorter sentences. (Tr.IX at 12, 15) It makes no sense to develop three or four-year programs for women when the vast majority serve substantially shorter sentences. (*Id.*) Finally, because the male population was so much larger than the female population, a greater variety of programs could be supported by the larger male population pool.

Thus there were reasons that were not sex-based for putting women in the facilities that DCDC did and for providing them with the different programs it did.

Petitioners' theory that any different treatment of the group of legally segregated women prisoners from that afforded men necessarily constitutes facial discrimination" is simply false analytically. It is simply not true that because a group is female that the only motive one can have for treating it differently from a group of males is because it is female. Where a sex-neutral reason is given, the burden is on one asserting discrimination to show that the real reason is discriminatory. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514-515 (1993); *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991); *Personnel Administrator of Massachusetts v. Feeney, supra*, 442 U.S. 274, 279-81.[2] Heightened scrutiny,

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[2] The exceptions to this rule are those "rare" official actions that, although gender-neutral on their face, are "unexplainable on grounds other than" gender, or to "a classification that is ostensibly neutral but is an obvious pretext" for sex discrimination. *Shaw v.*

which forms the basis for petitioners' equal protection argument is not warranted, because there is no facial or intentional discrimination. *Wisconsin v. City of New York*, 116 S.Ct. 1091, 1100 n. 8 (1996).

Furthermore, petitioners' theory would require that *all* differences in treatment between segregated groups of male and female prisoners must be ended by an *upward adjustment* of *either* group's relative disadvantage. While the women prisoners in the CTF high-rise must be given access to additional *recreation* opportunities comparable to those available in the rural Lorton setting, the men at the old Lorton facilities must also be given housing equally *secure* to that the women have at the modern CTF. This must be done despite the fact that these differences are demonstrably not the result of any intention to disadvantage anyone because of sex, and apparently without regard to cost. Surely the Constitution does not require this.

Reno, 509 U.S. 630, 643-44 (1993); *Personnel Administrator of Massachusetts v. Feeney*, *supra*, 442 U.S. at 272. Plainly, these exceptions are not applicable here.

I. Any Circuit Conflict on the Issue in this Case Does Not Warrant Review; Prison Work Details, Prison Industries, Recreation and Religious Programs are Not Within the Scope of Title IX of the Education Amendments of 1972, because they are Not Education Programs or Activities.

Petitioners assert that the decision of the in this case directly conflicts with the decisions of other circuits. There is no conflict on the constitutional equal protection issue. The decision of the Court of Appeals in this case is in full accord with the decisions of other circuits that are closest on their facts, namely *Klinger v. Department of Corrections (Klinger I)*, 31 F.3d 727, 732 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1994); *Pargo v. Elliott*, 894 F.Supp. 1243, 1254-62, 1290-91 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1-995), *cert. denied*, 117 S.Ct. 98 (1996); and *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996). These decisions, as petitioners concede, are directly in point. They deal with the same issues as were decided by the Court of Appeals in this case and are raised in the appellees' petition. They were decided in the same manner as the Court of Appeals decided this case.

Petitioners assert that there is a direct conflict of the decision in this case with *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994), which dealt with the applicability of Title IX of the Education Amendments of 1972, Pub. Law 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. § 1681(a),[3] to prison edu-

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[3] 20 U.S.C. § 1681(a) provides, in relevant part:

No person in the United States shall on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

cation programs. After the petition was filed, the Eighth Circuit issued its decision in *Klinger v. Department of Corrections (Klinger II)*, __ F.3d __, 1997 U.S. App. LEXIS 3296, *11-*13 & N. 6 (8th Cir. Feb. 27, 1997), which rejected the similarly situated analysis of the D.C. Circuit in this case in holding that Title IX is applicable to prison education programs.

This conflict is not sufficient to warrant review, because the holdings of lower courts in this case extended the reach of Title IX to the prison education and vocational programs in the District of Columbia prison system. The only question before the Court of Appeals (and this Court) is whether Title IX is also applicable to prison work details, prison industries, recreation, and religious programs. (8a-10a, 28a) No court has extended the coverage of Title IX to these programs. *See Jeldness, supra*, 30 F.3d at 1225-26 (Leaving open the applicability of Title IX "to the farm annex, the forest work camp, or the prison industries."); *Klinger II, supra*, 1997 U.S. App. LEXIS 3296 at *15-*17 ("[T]he only logical and workable application of the definition of 'program or activity' under Title IX requires comparison of educational opportunities for female and male prisoners within the entire system or institutions operated by a state's federally funded correctional department or agency."). Moreover, the question of the applicability of Title IX is not likely to arise again in the D.C. Circuit, because the only prisons in the circuit are already under a systemwide injunction concerning education and vocational programs that is at least as broad as permitted by *Jeldness* or *Klinger II*.

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assistance * * *.

The work details, prison industries, recreation, and religious programs at issue are not education programs and, as a consequence, are not within the scope of Title IX. Respondents raised this issue of statutory construction in both courts below, and argued in the Court of Appeals that the District Court had expanded the scope of Title IX to the prison context in unprecedented and extravagant ways by including those non-education programs. The Court of Appeals found it unnecessary to reach the issue in light of its similarly situated analysis; however, it "admitt[ed] to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned." (28a, 35a-36a)[4]

Respondents' argument is based on the language of the statute. Section 1681(a) provides: "No person in the United States shall on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." The Department of Corrections receives federal funds. Title IX applies only prison "educational programs or activities." Prison industries, prison recreation facilities, and prison employment services are not "educational programs or activities" under any reasonable interpretation of those terms.

Title IX of the Education Amendments of 1972 forbids discrimination on the basis of gender in any "*education* pro-

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[4] A prevailing party may assert any ground in support of its judgment "whether or not that ground was relied upon or even considered" by the court below. *Dandridge v. Williams*, 397 U.S. 471, 475-476, and n.6 (1970); *see also, Citibank, N. A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 672-673 (1990).

gram or activity" receiving federal funds. The adjective, "education," modifies "program or activity" and limits the scope of the statute. See 34 C.F.R. § 106.1 (1993)(Title IX "is designed to eliminate * * * discrimination on the basis of sex in any *education* program or activity"; italic added). If Title IX applies to prisons at all, it does not follow that every prison function is an "*education* program or activity." Prisons are places of punishment, of isolation from society, and exist, secondarily, "for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974). Many prison programs are designed to further prisons' penal functions and institutional interests, principally security and operational efficiency. Some are intended to assist in the ultimate reintegration of prisoners into society but, even as to those, few are "educational" except in the loose sense that all experience is a learning experience.

Prison work details, industries, and work training are not primarily educational; in none is there a student-teacher relationship, the essence of an education program or activity. Work details are "support duties needed for the running of the jail." *See* D.C. Code § 24-403 (1989 repl.)(prisoners may be used for public works at workhouse at Lorton); D.C. Code § 24-412 (same, at jail). Industries are "business[es] run out of a prison where goods are produced with inmate labor and then sold * * *." *See* D.C. Code § 24-418 (prisons may sell products manufactured at Lorton). "Work training," a name for outside employment, allows inmates on the verge of release to work for regular pay in jobs outside prison.

In short, work details are designed to keep prison buildings and prison in repair; industries are designed to make money for the prisons, supply goods for the government (and, incidentally, allow prisoners to earn more than minimal spending

money); and work training is intended to reintegrate prisoners into the labor pool. None of these prison functions resembles "education program[s] and activit[ies]" to which Title IX applies under any reasonable construction of those words.

Prison recreation is also not an "educational program or activity." Recreation is intended to keep prisoners active in order to provide outlets for energy and anger; maintain health; and relieve the boredom of captivity. Unlike "extracurricular" activities at educational institutions, where recreation is part of an educational curriculum,[5] penitentiary recreation is not part of a "curriculum." See Random House College Dictionary (1967)(curriculum defined as "the aggregate of courses of study in a school, college, etc.," and as "the regular or a particular course of study in a school, college, etc.")

In sum, as the District Court's description of work details, industries, and work training reveal, and as is self-evident from any consideration of prison recreational programs, none of these activities qualifies as an "education program or activity" to which Title IX applies. It follows that the District Court's reforms of these programs are erroneous contrary to the law on which the reforms are based.

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[5]Department of Education regulations include "extracurricular" as part of "education program[s] and activit[ies]." *See* 34 C.F.R. § 106.31(a). They also prohibit discrimination against "students" in physical education courses. *See* 34 C.F.R. § 106.34.

II. Petitioners' Equal Protection Analysis is Based on the False Premise that Treating Lawfully Segregated Groups Differently for Neutral Reasons Constitutes Sex Discrimination.

The linchpin of petitioners' equal protection theory is the notion that every difference in treatment of groups that are lawfully segregated by sex constitutes "facial" sex discrimination, even when undertaken for sex-neutral reasons. We submit that this theory is inconsistent with *Washington v. Davis, supra*, and this Court's other cases requiring that there be intentional discrimination on the basis of sex to support an equal protection violation. There was no proof that any of the differences in treatment between male and female prisoners here resulted from an intent to disadvantage female inmates instead of from sex-neutral reasons.

1. For obvious security reasons, segregation on the basis of sex is the rule in our nation's state and federal prisons and is fully consistent with the equal protection guarantees of both the Fifth and Fourteenth Amendments. *Dothard v. Rawlinson*, 433 U.S. 321, 326, 336-337 (1977); *Keevan v. Smith, supra*, 100 F.3d at 646 & n.2; *Jeldness v. Pearce, supra*, 30 F.3d at 1224; *Pitts v. Thornburgh*, 275 U.S. App. D.C. 332,340, 341, 866 F.2d 1450, 1458, 1459 (1989).[6] The appellees have not contested this explicit, gender-based classification; indeed, their penological expert testified that it conforms with

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[6] This valid, gender segregation distinguishes this case from *United States v. Virginia*, 116 S.Ct. 2264 (1996) ("*VMI*"), which deals with a state institution of higher learning and the nearly uniform practice is to provide co-educational institutions.

professional, penological standards. (Testimony of Ms. Lancaster, Tr. V at 57-58)

This valid, gender-based segregation permits prison officials to treat the female (or male) inmate population as a group. Programming can be gender-specific and tailored to the special characteristics of women (or men). Prison officials need not gear programming to a non-existent, mixed population. Because gender segregation is valid, decisions relating to programming or other aspects of running a women's prison are gender neutral. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (Upholding gender neutral state law that disadvantaged women by granting public employment preference to veterans, over 98% of whom, by virtue of the policies of the armed forces were men); *Keevan v. Smith*, *supra*, 100 F.3d at 650-651; *Jackson v. Thornburgh*, 285 U.S. App. D.C. 124, 127, 907 F.2d 194, 197 (1990).

Much of petitioners' legal argument is based on the assertion that decisions of District administrators concerning programs at women's prisons reflect "facially different treatment of men and women." (Pet. at 19) Petitioners' assertions that the District's decisions relating to programs in women's prisons, when different from those in male prisons, must have persuasive justifications, be substantially related to important governmental objectives, and warrant heightened scrutiny, all flow from their assertion of facial discrimination. In light of *Personnel Administrator of Mass. v. Feeney*, *supra*, that position is not supportable. *See also*, *Keevan v. Smith*, *supra*, 100 F.3d at 650-651.

2. The District's use of the special characteristics of the male population and the female population of prisoners does not reflect gender bias. Indeed, in devising programs for these different populations, respondents would have been

irresponsible so far as a corrections matter and fiscally, not to recognize and take into account, for example, that virtually the entire female population was composed of relative "short-timers."

Petitioners use the fact that the District relies on the special characteristics of the *population* of female inmates to support their argument that the District was engaging in "generalizations about men and women as a group"--*i.e.*, sex-stereotyping. (Pet. at 20) That is simply not accurate, as petitioners' own conduct at trial shows. As quoted above, in his opening statement in the trial below, petitioners' chief counsel stressed as "undisputed" the very differences that the Court of Appellees identified as "special characteristics." Petitioners elicited testimony from three expert witnesses (a penologist, a physician, and a psychiatrist) as further support for this trial court position. Thus, in the District Court petitioners sponsored the notion that the group of women prisoners here have special characteristics.

However, in their petition in this Court, petitioners variously call these same characteristics "alleged * * * 'special characteristics'"; "generalizations about men and women as a group"; "the so-called 'special characteristics' of women"; and "sex-based stereotypes." *See* Pet. at question presented, 20, 24. Petitioners' characterizations are misstatements of the record and contrary to their previous position. The Court of Appeals did not invent these characteristics or use them in a manner different from the way the case was argued in the district court. The characteristics have firm support in the record from evidence offered by both plaintiffs and defendants.

Having sponsored the notion that the group of women prisoners here have special characteristics, petitioners cannot repudiate that position in this Court.

3. The Court of Appeals correctly held that respondents could properly rely on neutral characteristics such as the size of the populations of men and women and the physical limitations of the facilities in which they are housed (for reasons unrelated to sex).

There are huge population disparities between men and women in the District's prison system as well as most other systems, with men comprising the vast majority of the total population. As noted by the court below, prison officials cannot replicate in a comparatively small women's institution even some of the programs offered in a much larger male institution and still offer programs that address the conceded special characteristics of women prisoners. (31a)

Petitioners' position also ignores the extreme limitations a facility can impose on the provision of work details, prison industries, recreation, and religious programs to inmates and the realities of running a prison. The limitations are especially great at the Central Treatment Facility (CTF), a facility in the District which has extremely limited space when compared to the District's Lorton facilities. CTF also has four groups of inmates which can not be mixed together during educational or other programming.

The CTF houses 800 inmates, composed of: (1) the Reception and Diagnostic inmates who cannot mingle with other inmates because they have higher security levels; (2) female offenders who must be segregated from the male population; (3) inmates in the Intensive Substance Abuse Program who are segregated from the general population for therapeutic reasons; and (4) physically impaired inmates who are vulnerable

to assaults from other inmates and have specialized recreation programs to meet their needs. Thus, in addition to limitations imposed by the physical plant, there are other groups of inmates who also be given access to the limited programming space available.

By contrast, the Central, Medium, and Occoquan Facilities at Lorton, Va. do not have the physical limitations on programming that exists at the CTF. These institutions are dormitory-type facilities in a rural setting in Lorton, Va. They do not resemble the multi-story urban setting of CTF. The populations of the three institutions are sufficiently similar that facilities do not have to be shared with groups that cannot be mixed, as at CTF. The structures are very old and inmate work details are needed for maintenance. These male institutions also differ from CTF in that they have a history of extreme inmate-on-inmate violence. Programs were provided at these institutions in part to reduce idleness and violence by giving inmates something to do.

In this case, limitations on programming that relate to the facilities themselves were properly considered by the Court of Appeals.

4. Petitioners' theory that all differences in the treatment of lawfully segregated groups constitutes "facial discrimination" requires eliminating all differences in programs afforded the different groups.

The program-by-program comparison petitioners advocate would place "dozens of substantive administrative prison decisions under close judicial scrutiny and subject[] them to after-the-fact second-guessing by a federal court." *Klinger*, *supra*, 31 F.3d at 732-33. This Court has repeatedly counseled judicial restraint in cases involving the running of the nations' prisons, based on the recognition that federal courts

are ill-equipped to supervise the actions of prison administrators in making these sorts of decisions. *Rhodes v. Chapman*, 452 U.S. 337, 351 n. 16 (1981) ("[T]he problems of prisons in America are complex and intractable, and more to the point, they are not readily susceptible to resolution by decree."); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); *see also*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1976). Petitioners' legal theory is counter to this doctrine.[7]

5. Petitioners argue that the decision below will permit "a government to discriminate on the basis of sex whenever it can articulate group-based differences between the sexes." (Pet. at 24) This ignores the fact that the decision below only applies to groups that are legally segregated by sex, and, as to such groups, it only requires that plaintiffs prove that any difference in treatment results from an intent to disadvantage because of sex. The decision does not permit a plaintiff to establish facial discrimination by showing some relative disadvantage in the result.

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[7] The searching judicial examination of programming decisions could have the consequence of inducing state and local prison administrators to eliminate prison programs in the face of liability based on program by program comparison. (35a) There is no obligation under the Eighth Amendment to provide inmates with work or recreational programs. It would "wrench the Eighth Amendment from its language and history" to hold that these or the other programs involved in this case were required. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Moreover, prison administrators would be less willing to establish new programs or experiment with new ones, knowing that an inmate suit was a possible consequence.

CONCLUSION

The petition for a writ of certiorari should be denied.

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